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CURRENT TOPICS.

The Supreme Court of the United States has adjourned. The following is a statement of the work accomplished: The number of cases finally disposed of and stricken from the docket of the United States Supreme Court during the term just ended is 387. As compared with last term this is a decrease of 12 in the number of cases disposed of. The number of cases awaiting the action of the court continues year by year to increase. At the end of the term of 1879 there were left undisposed of 791 cases; at the end of the October term of 1880 the number had increased to 837, and at the end of this term had reached 871. All but 14 of the cases argued and submitted this term have been decided. Among those which the court still has under consideration are civil rights cases, the Mercer colony land case from Texas and the case of the County of San Mateo against the Southern Pacific Railroad Company. This result is very fair for the time occupied by the session. It seems to us, however, that the session, considering the state of the docket, is rather short; would it not be better if the court should shorten the period devoted to the labors of the justices on the circuit, and thus enable itself to make some progress in disposing of the accumulation of undecided cases. The court undoubtedly needs the assistance of Congress in this matter, and unquestionably ought to have had it long ago. But, it seems to us that, pending this delay, vexatious and unjustifiable as it is, there is nevertheless an obligation upon the court to use its utmost endeavors to decrease the burden of arrearages with which it is oppressed.

The interest of our brethern of the law press in the discussion awakened by our remarks on the subject of judicial prolixity seems to be growing at such a rate, that if we are to continue to reproduce all that is said by our contemporaries upon the subject, we shall be compelled to establish a separate department in the CENTRAL LAW JOURNAL for such matter. Some recent remarks of the *Pacific Coast Law Journal* are of so interesting a character as to seem to us to be worthy of a reproduction, notwithstanding the fear that our readers are becoming tired of the topic:

> Very few cases arise which require the elaborate discussion frequently given to those of trifling importance. Where there is any authority which settles any point in dispute, it would seem that it ought to be sufficient, ordinarily, to say so and give the reference, without long quotations from it, and extended rediscussions of the point, whenever any bewildered or brain-racked lawyer chooses to raise it. Instead of this, it is not unusual to find the judges leaving this strong fortification and taking the open field, to ride down the counsel with opposing arguments. The former practice seems to be approved by the Supreme Court of Pennsylvania. In that court recently a case was argued with great learning and ability for three days by seven eminent lawyers, and the court's opinion occupied two lines: "The judgment of the lower court is affirmed on the authority of Doe v. Roe, 49 Penn. St. 50." We can not, however, agree to the suggestion of one of our contemporaries, that this fault springs from "mental confusion, indolence, vanity, or a demagogical desire to stand well with influential members of the profession." In not a few cases the fault is doubtless with the judge, but we are inclined to think not always, nor even generally. Our appellate judges, almost without exception, are overworked. The secret of the difficulty undoubtedly lies in the want of time for thorough digestion and assimilation, which are, of course, conditions precedent to concise and accurate statement. * * * As a consequence the judges write long opinions for the paradoxical reason that they have not time to write short ones. * * * * Under such circumstances, it would probably be no remedy against this sad consumption of time and ink, even if we filled the benches with editors! What we started out to say, however, was that the disease can not be altogether incurable, if we may judge from the showing made by the Supreme Courts of some of the States. Thus, at the end of its last term (February 27) the Supreme Court of Michigan had decided the last case before it, having an absolutely clear docket, and with its next term more than a month off. This is said to be scarcely more than its usual condition, for while some thirty or forty cases are generally carried over from one term to another, the majority of cases are decided within two or three weeks after submission. About 450 written opinions are filed each year. Such work as this could only have been done by thoroughly trained and accomplished jurists. The reputation of this court, however, has long been a part of the history of the country.

It is a fact worthy of note, too, that the opinions filed by this celebrated bench of judges are, upon an average, among the shortest delivered in the entire country. But neither that fact nor the charming rapidity with which the work is accomplished prevents their being cited with respect and relied upon as authority in every court of the Union.

SOME POINTS OF INTERNATIONAL LAW.

Encouragement of Foreign Insurrection.—In 1860 a revolt took place in Naples, which was, if not instigated, at least materially aided by the King of Sardinia. The liberal English press took an active part in encouraging the insurgents; they also received from England important material aid. The French, Prussian, Austrian and Russian courts joined in a severe censure of the Sardinian king. He was, however, sustained in his course by the English Government; and Lord John Russell, in an official letter to Sir J. Hudson, British Minister at Turin, went so far as to make the following extraordinary statement: "That eminent jurist, Vattel, discussing the lawfulness of the assistance given by the United Provinces to the Prince of Orange when he invaded England and overturned the throne of James II., says: 'The authority of the Prince of Orange had doubtless an influence on the deliberations of the States General, but it did not lead them to the commission of an act of injustice; for when a people from good reasons takes up arms against its oppressor, it is but an act of justice and generosity to assist brave men in the defense of their liberties.'" This Lord John Russel indorses; and yet it must be remembered that at the time the States General sent an army to invade England, there was peace between England and Holland, and there was no armed domestic resistance to James II. If England in 1860 could plead this precedent for encouraging a revolt in Naples, she can not now call upon the authorities in this country to prevent Irishmen from inciting an insurrection in Ireland. I can not but think that an attempt in Ireland to throw off English supremacy is unwise and desperate. But this is no reason why those who think differently, and who hold as honestly that Ireland is oppressed by England as did Lord John Russell in 1860 that Naples was oppressed by its Bourbon king, should not have full liberty to express their opinion. And it is important to observe that Lord John Russell's dispatch from which I quote, expressly encouraging, on the part of the English Government, insurrection in a State with which England was then at peace, is adopted as text by Sir Robert Phillimore, in the second volume of the third edition of his excellent work on International Law, published in 1882.

A very different question comes up as to the exportation of explosive compounds. Such compounds, when packed for secret transportation, and when not ordered by persons known to be engineers or machinists intending to use them legitimately, can not be sold without a knowledge on the part of the vendor that the intention is to apply them to purposes involving the destruction of property and life. It is no defense to procedure against such a vendor that the intention of his vendees was to use the dynamite in a foreign country. It has been held no defense to an indictment for sending a libellous letter that the letter was addressed to a person in another jurisdiction; nor would intention to circulate counterfeit paper exclusively in another jurisdiction be any defense to an indictment for having such counterfeit money in possession.

It is, I have no doubt, an indictable offense at common law to manufacture and keep in possession instruments that can only be used for an unlawful purpose. If this view be correct, the manufacturers of dynamite so prepared and packed as to be used clandestinely, ought to be prosecuted for the common law offense in a State court. If it should be proved that a particular parcel of dynamite, manufactured in this country, was afterwards so used in England as to take life, then the vendor of such a parcel, who had reason to know the purpose for which it was intended, would be as much an accessory before the fact as he would be if the object was to explode a railway train in the State of the sale, and if life should be lost by such explosion. The only question is that of jurisdiction. Only the State in which the dynamite is used so as to kill, could have jurisdiction. England, supposing the killing to take place on English soil, would, therefore, have jurisdiction in such a case; and, could she obtain possession of the person who sold the weapon, knowing it was to be used to take life, could try him as accessory before the fact.

Extradition.—The question, then, comes up, whether a demand for extradition made by Great Britain on the United States in cases of this class, ought to be complied with? It would be no answer to such a demand that accessoryship, before the fact, to murder, is

not within the range of the treaty with England, since accessoryship before the fact, to murder, receives the same punishment, and, in many States, is now treated as technically, as well as really, the same offense. It would, however, bar a surrender, if the offense is what is called political. By England, as well as by the United States, it has been consistently maintained that there should be no surrender for political offenses. So far has this been carried that, prior to our late civil war, demands for the surrender of fugitive slaves, who were indicted for the larceny of their master's horses, or other property, were persistently refused by the Canada authorities; and not only has England been the asylum of political refugees of all classes, but she has treated them sometimes with marked honor. Nor has this hospitality been confined to discrowned monarchs. Over and over again was the extradition of French conspirators, charged with attempts at assassination, refused by England when demanded by France. The government of Napoleon III. was incessant in its complaints of this indulgence, and finally, in 1870, a new treaty was negotiated between the two countries by which the process was made more stringent. During the correspondence which preceded the treaty, M. Dronyn de Lhuys, then French foreign minister, proposed that all that should be necessary to secure extradition should be proof of identity and of the fact that guilt had been charged by the proper officer of the State. To this England refused to accede, and the treaty, as executed, excepted from its operation all cases where the offense committed was political in its nature. This was reluctantly agreed to by the then government of France.

Since the institution of the republic in France, however, the French authorities have taken a different position. Three years ago a demand was made on France by Russia for the extradition of Hartman, charged with being concerned in the assassination of the late Czar. The demand was refused, ostensibly on the ground of defectiveness in the proof of identity, but in reality because the government did not choose to run counter to the Socialistic and Nihilist parties who vehemently urged that the assassination of the Czar was part of an insurrectionary rising which was as much political as was the rising which dethroned Napoleon III. and established the republic.

It is, at all events, plain that England can not, in view of the position taken in Lord John Russell's dispatch above given, urge that it is necessary, in order to clothe a movement to overthrow a government with a political character, that the movement should be by an armed force. The States General, when intervening in the time of James II., did not wait for an armed insurrection in England, but sent their forces over in advance of such insurrection; and this course the British government, in 1860, speaking through Lord John Russell, expressly commends. If, to make a conspiracy political, and hence to exempt parties to it from extradition, an armed revolt must have actually begun, there could be no armed revolt the planners of which would be protected by the clause in question, since there could be no armed revolt which is not planned by unarmed conspirators.

England, therefore, could not demand the extradition of parties to assassinations in Ireland, on the ground that as there was no open warfare against England in Ireland, the offence of such parties could not be called polititical, and hence would not be within the exceptions of the treaty. It is as lawful for Irishmen in America (foolish and morally wrong as it may be) to send aid to Ireland to foment a projected insurrection against England, as it was lawful for England in 1860 to foment an insurrection in Naples, or for the Dutch in 1680 to foment an insurrection in England. There is, however, another ground on which a demand for such an extradition may be far more successfully based. If the offence charged, was a conspiracy to overthrow the English rule in Ireland, then, on the above reasoning, extradiction should be refused. It is otherwise, however, when the offense charged is murder, and when the evidence shows that the murder was to be effected, not in open warfare, but by secret assassination. Such assassination is not a political act, any more than it is warfare. An assassin who should secretly kill a soldier, would be hung, as a murderer, by a court martial. He could not be regarded as a soldier, or as engaged in lawful warfare. The same reasoning would exclude the application of the term "political" from the assassina-

tion, and from the forwarding of dynamite for the purpose of producing explosions likely to be fatal to human life.

The Trent Case.—In several recent works of authority, the conclusions to be drawn from the Trent case, are considered.[1] Now that the controversy has receded into history, it is time that the same impartial examination should be awarded to it in the United States, as has been awarded by German and French, if not by English jurists. The facts, it will be remembered, were as follows: On November 8, 1861, while the British Royal Mail West India Steamer Trent was passing through the Bahama channel, she was signalled to stop by a United States war steamer, the San Jacinto; the San Jacinto firing a round shot across the bows of the Trent. The Trent was then boarded, and Mr. Mason and Mr. Slidell, envoys sent by the confederate government to England and France, who had taken passage in the Trent at Nassau, were forcibly removed from the Trent to the San Jacinto, against the vigorous protest of the commander of the Trent, and of the officer in charge of the mail-bags, who was a commander in the British navy. With Messrs. Mason and Slidell were also removed, their secretary, and all the papers connected with the mission, on which the officers of the San Jacinto could lay hand; the Trent then was permitted to proceed in her course, and Messrs. Mason and Slidell, with their secretaries, were lodged in Fort Warren.

The news of the capture threw England into wild excitement. The sympathies of the English upper classes, of probably a large majority of both houses of parliament, and of the press as a body, were then with the southern States, whom the government had already recognized as belligerents, entitled to the right assigned belligerents by the law of nations. Lord Palmeston at once prepared a dispatch to the United States government, so peremptory and overbearing in its tone that, had it been sent, further negotiation would propably have been precluded, and the only alternation would have been, war or abject submission on the part of the United States. The dispatch, however, was afterward so toned down, through the interposition of the Queen, as to make it possible for the United States to surrender Messrs. Mason and Slidell to the British government without disgrace; and the surrender was after a short delay, directed by Mr. Seward, then Secretary of State. The position in which the administration was placed was one of great difficulty. Almost the whole population of the northern States had applauded the capture of the envoys; and by eminent lawyers, of all political views the capture had been vindicated as in accordance with the law of nations. At a public meeting in Boston, in which some of the most prominent statesmen of New York took part, strong resolutions, sustaining the capture, were adopted; and Chief Justice Bigelow, of Massachusetts, a man of singular moderation of temper, as well as thorough legal training, declared at the meeting, that the capture was a legimate exercise of belligerent rights, and was in entire accordance with the political traditions of the United States. A few protests indeed were made, on the ground that stopping and searching neutral vessels on the high seas, and then forcibly removing from them what was claimed to be "contraband," was an act in contravention of the position heretofore taken by the United States, that a ship is part of the territory of the country to which she belongs. Those protests, however, were scarcely heard in the tumult of applause with which its capture was at first greeted, but soon the seriousness of the situation was understood. If the capture should have been sustained by us, then we would not only have abandoned a position, for which we went to was in 1812, but we would in a few days have had a British fleet bombarding our ports.

The grounds on which the demand was made were: (1) that the Trent was a *quasi* government vessel, entitled to the privilege of extra-territoriality, and (2) that Messrs. Mason & Slidell were not "contraband," and hence that their seizure and removal were not justifiable, even conceding that the Trent was subject to stoppage and search. Neither of these positions was accepted by Mr. Seward. He based the surrender on the grounds (1) that by the uniform doctrine of the United States neutral ships are exempt from search; and (2) that even if the right of search in time of war be conceded, the proper course in case of contraband being supposed to

[1] Holtzendorff, Reehts. Eng. 1883; Perels, Das. Int. Secrecht, 1882; Phillimore, 3d. Ed. Vol. II., 1882; and particularly the the 12th edition of Gessner's excellent work on Maritime law.

have been found, is to take the vessel seized to a prize court for adjudication. To these points Mr. Seward characteristically added the remark that as the detention of Messrs. Mason & Slidell was of no particular use to the United States, the United States had no desire to keep them, if the British government wished to have them.

More than twenty years have now passed since this brief, though momentous, controversy closed; and we can now, with the aid of eminent foreign jurists, who in the main sympathized with the United States in the late civil war, dispassionately consider its merits. These jurists, embracing the highest authorities in international law on the continent of Europe, unite in holding the following positions:

1. —*Right of Search not to be Exercised in Peace.*—This was one of the points at issu between England and the United States prior to the war of 1812. The English government claimed the right, not merely as a belligerent, but as a naval power irrespective of belligerency, to search vessels of all nationalities on the high seas for English deserters. This was contested by the United States. The treaty of Ghent contained no reference to this pretension, which, however, was never again put forward by England, and which Sir Robert Phillimore, a high English authority, now admits to be unsustained in international law. And this is now generally conceded to be the true view. If the right can be exercised in one case it can be exercised in all cases, and the whole shipping of the world would be at the mercy of the dominant naval powers. Not only would armed agencies be thus enabled to ransack the papers of merchant vessels, and communicate to their government, and to any other person interested, any information which could in this way be extorted; but innumerable provocations would be given which would lead either to war or to tame submission, ultimately as mischievous as war. It is said that this prerogative is necessary to clear the sea of pirates. But the prerogative is an impertinent intrusion into the business of individuals as well as into the territory of the State whose ships, being part of such territory, are thus invaded; and the mischief of sustaining such a prerogative is far greater than the evil of permitting a pirate to bear for a few hours a fictitious flag. Pirates, in the present condition of the seas, are readily tracked and discovered by other means than those given by the search of their papers; and the fact that in some instances they are caught when carrying false flags, no more sustains the right of general search of merchant shipping, than would the fact that conspirators sometimes carry false papers, justify the police in seizing every business man whom they meet and searching his correspondence. In the very rare cases in which an apparent pirate is seized and searched on the high seas under a mistake, the vessel being a merchant ship, the defense must be, not prerogative, but necessity, only to be justified on the grounds on which is justified an assault made on apparent but unreal cause. It may be added, that basing the right to search a vessel on the assumption of piracy, is a *petitio principii*, it being equivalent to saying that a vessel is to be searched because she is a pirate, when it is for the purpose of determining whether she is a pirate that she is searched. The searching, as is the case on issuing a search warrant in ordinary criminal practice, should be at the risk of the party searching, and only on probable cause first shown; not for the purpose of inquiring whether there is probable cause.

2. *Belligerents have a Right to Search Neutral Merchant Ships in Times of War.*—What has just been said applies exclusively to the right of search during peace. The right, however, of a belligerent cruiser, in times of war, to visit and search neutral merchantmen for contraband of war, is conceded on all sides, oppressive as this right is to neutrals, and undue as is the advantage it may give to the belligerent with superior naval power. The right, however, must be regarded as limited as follows: (1) No neutral ship should be searched on its way between two neutral ports. (2) The right is dependent on the actual pendency of war. (3) It can not be exercised within the territorial waters of a neutral State. (4) It must be based on probable cause; though the fact that this cause turned out afterwards to have been a mistake, does not of itself make the arrest wrongful. (5) Contraband persons or things can not be seized and appropriated by the captor. His duty is to take the vessel into a prize court by whom the question of contra-

band is to be determined. (6) In case of violent resistance, the vessel seized may be open to condemnation by a prize court as prize. But this is not the case with mere attempts at flight; and there should be no condemnation of a neutral vessel whose officers resisted search, they having no reasonable ground to believe in the existence of war. (7) The right of search is not to be extended to neutral ships sailing under convoy of a man-of-war of the same waters.

3. *Vessel should be taken into Prize Court.*—It has already been seen that the officers of a belligerent man-of-war can not be permitted to seize and take from a neutral ship contraband persons or things. The neutral ship must be carried to a prize court, and the question of contraband should be there judicially examined after due notice to all parties interested. Had this course been taken by the officers of the San Jacinto, after the search of the Trent, England would have had no cause to complain. She has uniformly maintained the competency of prize courts to adjudicate such questions, and the conclusiveness of their decrees. And this view has been accepted by the United States as well as by all other maritime States.

4. *Envoys accredited by a Belligerent State to a Neutral State are not Contraband, though the Independency of the Belligerent has not been Recognized by the Neutral.*—This, had the Trent been brought before a United States prize court, would probably have been held to be the law; but be this as it may, the great preponderance of authority at the present time is in favor of this position. No doubt despatches from a belligerent to a neutral, in respect to naval or military operations have been held by the English courts to be contraband,[2] and this view has been accepted by the courts of the United States. It is otherwise, however, in respect to despatches of a belligerent to a neutral relating to matters of business. Still more strongly may it be asserted that a belligerent, under the law of nations, may send envoys to a neutral without exposing such envoys to the risk of being captured at sea when on board a neutral ship. Diplomatic negotiations between a belligerent and a neutral may be among the most efficient means of restoring peace; and, aside from this view, the neutral is entitled to maintain permanent official intercourse with both belligerents. Nor is it necessary that the independence of the belligerent, in order to secure these rights of diplomatic representation, should have been acknowledged by the neutral. It is enough that belligerency should be so acknowledged. The fact that a government of a territory having complicated business relations with a neutral State, should be recognized by such neutral as belligerent, entitles the belligerent to send envoys to the neutral. No blame could be attached to England for recognizing the Confederate States as belligerents, since this recognition did not take place until the United States government had recognized such belligerency. It is true, a belligerent envoy to a neutral may be seized by the other belligerent when on his way over the latter's territory. But one belligerent can not invade the territory of a neutral for the purpose of seizing the person of such an envoy; and if the territory of a neutral can not be invaded for this purpose, a ship of a neutral can not be visited and searched for the purpose of making such arrest. In resenting, therefore, the arrest of Messrs. Mason and Slidell, and insisting on their restoration, England made at least some progess to the recognition of the doctrine previously and subsequently contended for by the American courts, that a ship is to be regarded (except when carrying goods contraband of war, or contraband despatches), as part of the territory of the State to which she belongs.

FRANCIS WHARTON.

Paris, April, 1883.

[2] The Caroline, 6 C. Rob. 466.

LIBELS IMPUTING INSOLVENCY.

Though the law relating to slander and libel is always developing, and a perpetual succession of wrongs of this class keeps the courts in good practice, yet there is one point which seems to have been brought out into a clearer light than it was before. That point is as to the natural construction which the words bear when they contain the alleged libel or slander. It has long been the law in this country—in this nation of shopkeepers—that the imputation of insolvency or bankruptcy upon a person is a cause of action, and no

special damage need be alleged or proved in order to support the action. This is or was qualified, however, to some extent by another circumstance, namely, that the imputation must have had some reference to the particular trade or profession carried on. And when it was the law, as it was till recent years, that only certain classes called traders could be made bankrupts, the imputation of bankruptcy or insolvency had only a limited class of people to whom it could apply. Indeed, a gentleman at large probably felt it once to be a compliment to have it said of him how much he was over head and ears in debt—whether by the hounds, or the turf, or good fellowship—for impecuniosity was once a sort of spurious badge of gentility or popularity. But now that dukes can be made bankrupt like the rest of us, the imputation of insolvency may now be said to be slander or libel, according as it is verbally or by writing launched at our heads. And as this imputation comes home to most of us, and solvency is a treasured characteristic of each and all, any advance in clearing up the law ought to be welcomed from whatever quarter it comes. And fortunately we have had quite recently a most impressive and interesting litigation as to how far one may go and how near one may run to the edge of precipice, and yet escape the risk of an action of damages.

Nothing is more common than for great manufacturing firms, and also for charitable institutions, to change their travellers or collectors of subscriptions, and to give notice to their customers or subscribers of the change. For example, a circular may be issued to the effect that, "we beg to give notice that Mr. John Brown is no longer traveller or collector for our firm, and in future orders or remittances may be sent to our place of business." If this announcement be carefully made so as not to convey the imputation that Mr. Brown was convicted of false pretences, or embezzlement, or discharged for swindling, or some kindred malpratice, nobody can complain; and even Mr. Brown himself must admit that it is lawful and legitimate business to issue such a circular. But too often careless language is used, and Mr. Brown being offended brings an action, and may succeed. All must turn on the language used. It must be a bare statement of the fact and nothing more on these occasions.

This last point was very neatly brought out in a case of Mulligan v. Cole.[1] The defendants were managers of an institute of science and art, and the plaintiff had been teacher and collector of subscriptions. The institute published in the newspapers this advertisement: "Walsall Science and Art Institute.—The public are respectfully informed that Mr. Mulligan's connection with this institute has ceased, and that he is not authorised to receive subscriptions on its behalf." The plaintiff brought an action for this, and contended that it ma liciously imputed that he had been pretending to be authorised to collect supscriptions. But first one judge and then three all agreed that the words, when fairly interpreted did not impute any misconduct to the plaintiff, and it was no more libellous than for a partner to advertise that the firm was dissolved, and that he was authorised to receive debts. Fortunately it is for the court and not for the jury to interpret the words and say whether they are capable of the perverted meaning attributed, and if they are not, then no action can be brought.

The most interesting case in modern times on this part of the law of libel has just been concluded after a heavy litigation, and will henceforth be known as a leading case. This was The Capital and Counties Bank v. Henty.[2] It was tried at the assizes when the judge gave an opinion, but the jury disagreed. It was then argued before two judges, who ordered a new trial. Then t was appealed, and the court of appeal, by a majority of two to one, held that a new trial was wrong, for no action could lie at all. Next it was appealed to the House of Lords, and as there was a difference of opinion it was ordered to be argued a second time before five law lords. And, by a majority of four to one, the House held that the words were not actionable and gave judgment for the defendant. So that 11 judges were concerned, and four differed from the others. Hence it deserves to be treated as a leading case in future.

The cause of action arose in this way. The Capital and Counties Bank had various branches in Hampshire. Messrs. Henty & Sons were brewers in a large way of business

[1] L. R. 10 Q. B. 549.
[2] 16 Cent. L. J. 97.

in that district, and had about 137 customers, to whom they sent the following circular: "Messrs. Henty & Sons hereby give notice that they will not receive in payment, checks drawn on any of the branches of the Capital and Counties Bank (late the Hampshire and North Wilts)." The bank sued the brewers for this, and alleged that it meant that the plaintiffs were not to be relied upon to meet the checks drawn upon them, and that they were not to be trusted to cash the checks of the customers, whereby great damage had been caused to the bank, who claimed 20,000*l.* damages. The case in due course went to trial, and it appeared that the publicans who dealt with the defendants took these checks in the course of their business from their own customers, and paid them to the brewers as cash. In 1878 a new manager came to the Chichester branch bank, and he objected to cash the checks if drawn on other branch banks. This he was no doubt entitled to do, for branch banks are in effect in the same position as foreign banks to each other. But this irritated the brewers and caused them much inconvenience, because formerly they were allowed to treat all the branch bank checks alike. This led to an angry correspondence, which ended in a kind of mutual defiance and in the circular of the brewers to their customers. This seemed at first sight only a fair retaliation. The bank were not bound to cash the checks on their branch banks for the convenience of their customers, and, on the other hand, the brewers were not bound to treat the checks on the bank, or, indeed, anybody's checks, as cash. But the brewers were careful in wording their circular. They did not publish it in the newspapers or placard it on the walls, as this might have been treated as some evidence of malice. But they confined the circular to their own customers, and everybody, of course, has a sort of privilege in making confidential, and even libellous, statements in defense of their pecuniary rights. But the immediate result was considerable. A run on the bank followed to the extent of 277,000*l.*, and thus its business was prejudicially affected. Another correspondence ensued between the parties, but the brewers answered that they had no intention whatever to injure the bank by the circular, and it was confined to their own business.

It was thus scarcely to be wondered that the bank, smarting from such a misfortune, should commence the action, and the law was somewhat vague on the subject. The trial took place before Lord Coleridge, who left it to the jury to say whether the brewers had not abused their privilege in dealing thus with their customers and the bank. The jury were unable to agree. Afterwards, the defendants moved to enter judgment for themselves; but the court, consisting of Grove, J., and Denman, J., thought there ought to be a new trial, for that the circumstances, taken along with the words, might give them a malicious meaning. Next, the Court of Appeal heard arguments on this nice and interesting difficulty, and while Thesiger, L. J., was in favor of the plaintiffs, Brett, L. J., and Cotton, L. J., were in favor of the defendants. Cotton, L. J., thought that the brewers had acted fairly and within their rights. And he added that when a defamatory statement is made on a privileged occasion, there must, in order to render the statement libellous, be evidence of express malice, that is to say, of something other than merely to perform a duty, or to make the communication in the interests of the person who receives it; but there was no evidence here to justify such a conclusion. And Brett, L. J., observed that it seemed unreasonable, when there are a number of good interpretations, that the only bad one should be seized upon to give a defamatory sense to the document.

The next step was to appeal to the House of Lords, where the points of law were again argued at length, first before three law lords, and, as they differed, or inclined to do so, then before five. Time was taken for consideration, and the result was, that four law lords, namely, the Lord Chancellor, Lords Blackburn, Watson and Bramwell, were for the defendants, and Lord Penzance for the plaintiffs. The Lord Chancellor said that the words in their natural or reasonable sense did not convey the meaning alleged by the plaintiffs. Nor was there any evidence on which a jury could have been justified in finding that the defendants published a libel concerning the plaintiffs. Lord Blackburn said that the circular did not convey the meaning alleged, but at the same time he quite agreed that such a statement might be published in such a way and to such persons as to show that its natu-

ral tendency would be to convey an impression that the person refusing to take the checks on that bank did doubt its credit, and then it would be libellous. But he thought it was a moral duty in the brewers if they intended not to treat the checks as cash to give notice and warn their own customers of that intention. Lord Bramwell also said that the brewers had a right to do and say what they did and said, and if people will draw from their doings a possible inference of insolvency in the bank, it was no fault of the defendants.

Such was the decision in this important case, and though it was in favor of the defendants, those who wish to imitate their example require to be very cautious as to the words they use and the persons to whom they use those words. If, for example, the brewers in this case had scattered the circulars right and left, or advertised it to all the world, all the law lords seem to admit that there would then have been evidence of malice, or at least of an abuse of the privilege of protecting their own rights. The dissenting judge was Lord Penzance, who gave an elaborate opinion, and who said it was a question for the jury and not for the judge, and the proper question for the jury ought to have been this, namely, whether the words would be calculated to raise in the minds of those to whom they were addressed an imputation against the solvency of the plaintiffs or not. And the main question for the jury would be as to the circumstances under which and the persons to whom the circular was addressed. This view, of course, must now be considered erroneous, and the first question in all such cases must be for the judge to decide, namely, whether in the fair use of words they are capable of the libellous meaning.

The risks of running so close to the wind in circulars of this description are great, but the present case is a useful illustration of the art of doing the difficult feat without responsibility.—*Justice of the Peace.*

RAILROAD — LIABILITY FOR INJURY TO EMPLOYES — CONTRIBUTORY NEGLIGENCE—MEASURE OF DAMAGES.

KANSAS PACIFIC RY. CO. v. PEAVY.

Supreme Court of Kansas, January Term, 1883.

1. A railroad company can not contract in advance with its employes for the waiver and release of the statutory liability imposed upon every railroad company organized or doing business in this State by ch. 93, Laws 1874, and a contract in contravention of this statute is void and no defense to an action brought by an employe of a railroad company for damages, in consequence of the negligence or mismanagement of a co-employe.

2. Opinion is inadmissible on questions which can be decided by the jury upon the facts.

3. Instructions should, as far as possible, conform to the actual facts in proof, and where there is no evidence in an action for damages resulting from the alleged negligence of the defendant, tending to show that the injuries were caused by such gross negligence on the part of the defendant or his servants as to imply wanton or wilful injury, an instruction that if the jury believe from the evidence that the accident in question was attributable to the want of ordinary care on the part of the plaintiff, he can not recover, unless the jury further believes from the evidence that the defendant was guilty of such gross negligence as implies wilful injury, is erroneous and misleading.

4. Where two parties, each of whom are under duty to exercise ordinary care, are guilty of negligence contributing to the injury of one of them, the injured party can not recover damages therefor from the other on the sole ground that his negligence was less than that of the other.

5. In an action against a railway company for personal injuries, brought by an employe of the company, in a case where the company is liable only for ordinary negligence, and not for slight negligence, if the plaintiff himself is guilty of ordinary negligence contributing to the injury he can not recover, if the negligence of the railway company or a fellow employe is merely greater than his, for in this class of cases the plaintiff must have exercised ordinary care, and not have been guilty of ordinary negligence to sustain h i action.

6. In an action brought by a brakeman for personal injuries received in attempting to couple two cars together, where the sole permanent disability is the loss of the thumb and first finger of the right hand, and where the party from such injury was laid up a little over a month and could not do anything for three or four months, a verdict of $6,500 is so excessive as to show that it was given under the influence of passion or prejudice, and ought to be submitted to the judgment of another jury.

Error from Wyandotte County.

J. P. Usher and *A. L. Williams*, for plaintiff in error; *Thos. P. Fenlon* and *J. B. Scruggs*, for defendant in error.

Action to recover for personal injuries sustained by Peavey while in the employ of the Kansas Pacific Railway Co. on August 23, 1879; petition filed January, 17, 1881. The Railway Co. set up as a second defense to the petition a written contract executed on August 11, 1875, wherein Pea-

vey, in consideration of employment by the railway company at two dollars per day, to be paid to him for the services to be rendered by him for the company, agreed to release, discharge and acquit the company from all liability and responsibility whatever on account of any and every personal injury which he might receive while engaged in the service of the company, whether the same was caused by carelessness, negligence, incompetency or unskilfuluess of all or any of the other servants of the company. Peavey demurred to the second ground of defense, which demurrer was sustained by the district court. Trial was had at the July term of the court for 1882; the jury returned a verdict for Peavey, and assessed his damages at $6,500. The court rendered judgment thereon, and the railway company brings the case here. The statute of Kansas referred to in the opinion was approved February 26, 1874, and reads as follows: "Section 1. Every railroad company organized or doing business in this State shall be liable for all damage done to any employe of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes to any person sustaining such damage." Ch. 93, Laws 1874.

HORTON, C. J., delivered the opinion of the court:

The petition alleges substantially that the defendant in error, plaintiff below, was employed as a brakeman and yardman by the railway company to work at Armstrong in this State, and while engaged in attempting to couple two cars together on the 23d day of August, 1879, was, without his fault, injured through the negligence of one of the engineers of defendant below, in carelessly and recklessly shoving and pushing a car against him, whereby one of hands was caught between two cars and greatly injured and mangled. Although the petition alleges the engineer was incompetent and the company employed him without due caution, yet no evidence was offered in support of these latter allegations, and the case went to the jury solely on the supposition that a liability had been incurred under the statute. Ch. 93, Laws 1874. The railway company set up in its answer, among other defenses, a contract containing a waiver and release fully covering all liabilities imposed by the statute. To this defense, plaintiff filed his demurrer, alleging the contract was contrary to law, against public policy and void. This demurrer was sustained by the court, and we are confronted at the threshold of the case with the question of validity of this special contract. Prior to the statute of 1874, the rule of the common law prevailed in this State, that a master was not liable to his servant for an injury happening in consequence of the negligence of a fellow-servant engaged in the same general employment, unless charged with some degree of fault or negligence in the selection or retention of the fellow-servant. The legislature of the State has, however, changed the common law rule, and the statute makes a railroad corporation liable for the negligence of one employee causing injury to a co-employee, without regard to the negligence of the company in selecting or retaining the employee. Whether this legislation be wise or not, it is not within our province to determine. We must assume the legislature had satisfactory reasons for changing the rule of the common law, and having adopted the statute, as we may assume, for wise and beneficial purposes, we do not think a railroad company can contract in advance for the release of the statute liability. It is a familiar principle of law that a contract made in violation of the statute is void, and also that agreements contrary o the policy of the statutes are equally void. There are exceptions. Thus, it is no part of the policy of the law to encourage frauds by releasing the fraudulent party from the obligation of his contract, and so a party shall not set up his own illegality or wrong to the prejudice of an innocent person. Bemis v. Becker, 1 Kan. 226.

Again, he who prevents a thing being done shall not recover damages resulting from the nonperformance he has occasioned. The plaintiff below is not within these or other exceptions, and therefore the ruling of the district court upon the demurrer must be sustained. Further, whilst the reasons for the rule of the common law that the master ought not to be responsible for the injuries inflicted upon one servant by the negligence of another servant in the same common employment seems plausible and correct theoretically, yet we may assume that the legislature did not find the practical operations of the rule as affording sufficient security to persons engaged in the hazardous business of operating railroads; that for the protection of the lives and limbs of the employees of such companies, the legislature deemed it necessary to enact the statute making these companies liable for all damage done to any of their employees in consequence of the negligence of a co-employee.

Now, if the statute was enacted for the better protection of the life and limbs of railroad employees, it would be against public policy for the courts to sanction contracts made in advance for the release of this liability, especially when we consider the unequal situation of the laborer and his employer. Take this illustration: In some States, and in our own, the owners of coal mines, which are worked by means of shafts, are required to make and construct escapement shafts in each mine for distinct and separate means or ingress and egress for all persons employed or permitted to work in the mines. Such a statute is for the benefit of employees engaged in working in coal mines, but the owner of such a mine would not be permitted to contract in advance with employees for operation of the mine in contravention of the provisions of this statute. The State had such an interest in the lives and limbs of its citizens that it has the power to enact statutes for their protection, and the provisions of

such statutes are not to be evaded or waived by contracts in contravention therewith. The general principle deduced from the authorities is that an individual shall not be assisted by the law in enforcing a contract founded upon a breach or violation on his part of its principles or enactments; and this principle is applicable to legislative enactments, and is uniformly true in regard all statutes made, to carry out measures of general policy. The rule holds equally good if there be no express provision in the statute peremptorily declaring all contracts in violation of its provisions void in regard to statutes intended generally to protect the public interests or to vindicate public morals. Sedg. on Constr. of Stat. and Const. Law, 2d ed., 337-338. With our interpretation of the statute of 1874, and the fairly inferred intent of the legislature in enacting it, the omission therefrom of the addition in the Iowa statute, "and no contract which restricts such liability shall be legal or binding," does not empower a railroad company to evade its liability by contract.

Counsel refers to Railroad Co. v. Petty, 25 Ind. 413, permitting a land owner to waive by contract a liability imposed by statute upon a railroad company for injuring animals unless its road is securely fenced. That decision may rest upon the well known maxim "that he who prevents a thing being done shall not recover damages resulting from the non-performance he has occasioned." Clearly, where the owner of land through which a railroad passes has undertaken with the company to enclose the road with a lawful fence, he ought not to recover from the company damages for an injury to his stock which results wholly from his failure to perform his contract. Upon the trial plaintiff below was asked by his counsel the following questions:

Q. "Now I will ask you, again, Mr. Peavy, judging from your experience, would you have been injured upon that occasion if that car had approached you in the usual and proper rate of speed for making couplings?" The question was objected to by the railroad company, but the objection was overruled and the answer was given. A. "I don't think I would."

Another witness, Myers, was asked by the same counsel the following: Q. "I will ask you to state whether or not it is a fact that brakemen in making couplings of that kind are or are not compelled to rely to a great extent upon the prudence of the party handling the engine?" Like objection was made and overruled. The answer was: A. "Yes, sir; they are." The objections to the questions cited ought to have been sustained, as it is a general rule that opinion is inadmissible on questions which can be decided by the jury on the facts.

A brakeman brought an action for injuries received in coupling the engine on the train he was engaged in operating, to a car laden with timber. A witness, who was a railroad agent, and had been two years a brakeman, was asked this question: "What is the proper way to couple cars when timber projects?" The court sustained the objection to the question, and refused to permit the witness to answer. Hamilton v. R. R. Co., 36 Iowa 31.

A brakeman, while attempting to couple two loaded freight cars to the mail car was crushed by the bumper of the mail car overriding that of the freight car and permitting the platform to come in contact, of which injury he died. On the trial to recover damages, the depositions of various witnesses who had been brakemen, baggage masters and conductors upon railroads, where read in evidence giving their opinions that if the draw heads, or bumpers, had been properly matched, there would have been no danger of one overriding the other, and that if the drawheads had been properly matched there would have been no danger of the person being crushed between the cars in making the coupling. The matters referred to in the deposition, were held not proper subjects of opinions. Muldoney v. Railway Co., 36 Iowa 462.

A brakeman brought an action for injuries received while coupling cars. The opinion of experts that he was careless in the manner of his doing the work was deemed inadmissable. Hopkins v. R. R. Co., 78 Ill. 32.

In an action for injuries sustained while attempting to oil a part of the machinery of a steam engine, an expert engineer was asked if he thought that the plaintiff in oiling that part could have been injured unless he was careless. This was held improper. Buxton v. Somerset Potter's Works, 121 Mass. 446; Bizby v. R. R. Co., 49 Vt. 127; Hill v. R. R. Co., 55 Me. 438; Coons v. Railway Co., 65 Mo. 592; 2 Thompson on Negligence, 799; Monroe v. Latten, 25 Kan. 351; Parsons v. Lindsey, 26 Kan. 426.

"The experience of courts with testimony of experts has not been such as to impress them with the conviction that the scope of such proof should be extended. Such testimony is not admissable in any case when the jury can get along without it, and is only admitted from necessity, and then only when it is likely to be of some value." Morgan's Appeal, 29 Mich. 5.

The matters upon which the opinions were given in the evidence objected to, were on questions which could have been decided by the jury on the facts, and of the facts, after a full hearing thereof, they were the competent judges.

Counsel for plaintiff below suggest, that if the questions asked were in competent, that the error was immaterial, as to the second question, we might assent; but we think differently of the opinion of the injured party. His evidence was likely to have exercised great influence, at least in a close case like this, it might have been productive of some effect at least.

Among other instructions given, was the following: "If the jury believe from the evidence that the engineer's conduct was the proximate cause of the injury complained of, and that the plaintiff's conduct was the remote cause of such

injury, then the plaintiff ought to recover, but if jury believe from the evidence that the conduct of the engineer was the remote cause of the injury, and that of the plaintiff the proximate cause of the injury, then the plaintiff can not recover."

This instruction, especially in the absence of the quallifying word "negligent" before the word "conduct" was erroneous within the views expressed in R. R. Co. v. Plunkett, 25 Kan. 188, and as in that case, so here, if the plaintiff below was guilty of negligence at all, it was certainly as near to the injury, as was that of the company.

The court also instructed the jury that: "The jury are instructed that the plaintiff was bound to exercise ordinary care and prudence in attempting to fasten the coupling to the cars, and though the jury believe, from the evidence, that the coupling in question was dangerous, still, if they further believe from the evidence that accident in question is attributable to the want of ordinary care, on the part of the plaintiff, then he can not recover, unless the jury further believe from the evidence, that the defendant was guilty of such gross negligence as implies wilful injury. The jury are further instructed, if they believe, from the evidence, that the plaintiff was injured (being at the time an employe of the defendant) in consequence of the negligence of the engineer in charge of the engine, and the plaintiff at the time was free from any contributory negligence, the plaintiff is entitled to recover."

A part of this instruction was misleading from the fact that it was apparent from the evidence, that the engineer was not guilty of such gross negligence as implies wilful injury. The most that can be charged against the engineer, if anything, is that he was guilty of negligence in the application of too much steam in the engine, or in the management of the engine, whereby the car cut off, was sent back too fast and at an unusual rate of speed. The jury found, as a matter of fact, the plaintiff below had control of the engineer, as to signals, and the engineer obeyed the signals to start, stop and cut off. Instruction should, as far as possible, conform to the actual facts in proof, and the giving of abstract propositions of law, however good in themselves, if not applicable to the case on trial, often distract and confuse the jury, and in cases like the one at bar, are liable to be greatly prejudicial. As there was no evidence tending to show gross negligence implying wilful injury on the part of railway company or its engineer, the trial court ought not to have used such term in its direction.

Further, while it is settled in this State that a party may recover for injuries done to him or his property, caused by the negligence of others, even if negligence is slight, nevertheless this court has not adopted what is generally called the rule of comparative negligence. Under the law, as settled in this State, ordinary negligence on the part of a plaintiff will defeat a recovery, except in the case of wanton or wilful injury. Where two parties, of each of whom the exercise of ordinary care is required, are guilty of negligence contributing to the injury of one of them, the injured party can not recover damages therefor from the other, on the sole ground that his negligence was less than that of the other, and generally the mere fact that the plaintiff has been guilty of less negligence than the defendant, will not authorize a recovery on his part. And if, in the case at bar, the company or the engineer was guilty of slight negligence only, the plaintiff below would not have any right to recover, even if he were not guilty of any negligence at all. For, in this class of cases, a railroad company is liable only for ordinary negligence and not for slight negligence. Therefore, if the plaintiff below was guilty of ordinary negligence contributing to the injury, he can not recover if the negligence of the railway company or its engineer was merely greater than his; for the plaintiff below must have exercised ordinary care, and not have been guilty of ordinary negligence. Upon a new trial the instructions of the court will conform to the views herein expressed.

Within the prior decisions of this court, the damages awarded by the jury are excessive. The plaintiff below lost the thumb and first finger of his right hand; he was laid up a little over a month, and could not do anything for three or four months, but he was at no expense for surgeons, as medical assistance was furnished him by the railway company. He spent a little for drugs, and was nursed by his wife. In R. Co. v. Hand, 7 Kan. 380, the injured party was hurt n the third finger of his right hand, causing a slight deformity and some loss of power in the hand; besides other bruises, he had received an injury to his lung, which caused him some uneasiness, and rendered him more liable by exposure to attacks of a pulmonary character. His counsel claimed in the argument of that case before this court, that the evidence adduced tended to show the time of the injured person, while suffering from the immediate effects of his injuries, was worth $1,800; that his board and physician's bills would carry these figures to $2,000. The verdict was $5,000, yet Kingman, C. J., speaking for the court, said: "An examination of the evidence has convinced us that the damages awarded are so excessive as to show plainly that the verdict was given under the influence of passion or prejudice, and ought to be submitted to the judgment of another jury." In Railway Co. v. Milliken, 8 Kan. 647, it was shown that the yardman at Ellsworth was assisting in making up a train at that point; that while engaged in coupling cars, his hand was caught between the draw-heads of the cars and so crused that amputation was necessary. Mr. Justice Brewer, for the court, said in that case: "Where the sole permanent injury was the loss of a hand, which was amputated just above the wrist without any protracted sickness or length of confinement, an award of $10,000 shocks the sense of right. * * * * In whatever light we look upon this verdict, it seems to

us to be largely in excess of a fair compensation for the injury." In Railway Co. v. Young, 8 Kan. 659, the injury was the loss of a hand, happening while the employee of the railway company was attempting to couple cars. The verdict was $9,000. This was also held excessive. If an award of $10,000 for the loss of a hand taken off at the wrist was so excessive as to shock the sense of right (Railway Co. v. Milliken, *supra*), an award of $6,500 for the loss of the thumb and finger of a hand clearly indicates passion or prejudice on the part of the jury. Counsel for the defendant in error refer to the case of Railway Co. v. Young, 19 Kan. 489, where a majority of this court decided not to set aside a verdict of $10,000. The first time the case was before this court it was held that $9,000 damages were excessive. It was then submitted to the judgment of another jury. Upon the second trial, the jury gave $10,000. A court must hesitate greatly before twice setting aside a verdict on the sole ground of excessive damages, and in view of the many years (nearly ten) elapsing between the injury and the final verdict in that case, and in view, further, of the fact that two juries had decided in favor of so large damages, a majority of this court thought they ought not to disturb the verdict solely for excessive damages. That case, owing to these circumstances, is not parallel with this. Following the prior decisions of this court, the amount of damages given by the jury is so largely in excess of any fair compensation for the injury inflicted, as to require us to interfere and set the verdict and judgment thereon aside.

Other questions are elaborately discussed in the briefs, but sufficient has been said already to indicate the views of the court as to the declaration of the law governing the case upon another trial.

The judgment of the District Court must be reversed and the cause remanded.

VALENTINE, J., concurring specially.

I concur in the decision of this case, and, I concur in the most of what is said in the opinion delivered by the Chief Justice; but I am not prepared to say that I concur in all that is said in such opinion. I concur generally in what is said respecting negligence. I think it is error for a trial court to instruct the jury, with reference to gross negligence, when the evidence does not tend to prove any such negligence. And I also think it is error for a trial court to instruct the jury with reference to remote negligence, when, if the evidence proves that any negligence at all was committed, it proves that such negligence was direct, proximate and immediate. I also concur with the Chief Justice, in saying that this court has never adopted any rule that can with any degree of propriety be called comparative negligence; unless such has been done merely by the recognition of degrees of negligence, or by the recognition of the fact that in all actions for negligence (except possibly where a passenger sues a common carrier), the plaintiff, in order to recover, must not be equally guilty with the defendant, but must, in fact, be free from all culpable, contributory negligence. This court has certainly never adopted the rule which the senior counsel on the side of the plaintiff in error in this case calls comparative negligence. This court has never held that a plaintiff in an action founded upon negligence could recover, where his want of ordinary care contributed directly to the injuries complained of; but, on the contrary, this court has always held that the plaintiff under such circumstances could not recover, whatever might be the degree of the negligence on the part of the defendant. Of course, this court, in delivering opinions, has sometimes recognized the fact that there *might* be cases where the defendant's conduct *might* be so grossly negligent and wanton that the plaintiff might recover, notwithstanding his failure to exercise ordinary care. But such cases hardly come within the rules of negligence, and even in such cases, this court has generally been very careful to say that the plaintiff could recover only where the injuries would have, in all probability, occurred, notwithstanding the plaintiff's want of ordinary care. In cases like the one now before us, each party is required to exercise ordinary care, and neither party is required to exercise great or extraordinary care. The want of ordinary care is ordinary negligence; but the want of great extraordinary care is only slight negligence, and while either party will be held to be guilty of culpable negligence, if found to be guilty of ordinary negligence, yet neither party will be held to be guilty of culpable negligence, if found to be guilty only of slight negligence. This, I think, is the doctrine of all the courts, and, many of the courts use similar language to express the doctrine. In Wisconsin, the supreme court, in the case of Griffin v. The Town of Willow, 43 Wis. 509, decides as follows: "It is the settled law of this State that 'slight negligence' is not a slight want ordinary care; but, merely a want of extraordinary care, and such negligence on the plaintiff's part, will not prevent a recovery for injuries caused by a defective highway." In the case of Cremer v. The Town of Portland, 36 Wis. 92, the court decides that "'slight negligence,' is not a slight want of ordinary care, but a want of extraordinary care; and the law does not require such care of the person injured by the negligence of another, as a condition precedent to his recovery." See also the cases of Dreher v. Fitchburg, 22 Wis. 675; Ward v. M. & St. P. R'y. Co., 29 Wis. 144; Hammond v. Mukwa, 40 Wis. 35.

The terms "slight negligence" and "want of extraordinary care" are convertable terms, meaning one and the same thing.

The senior counsel, in this case, on the part of the railroad company, would have this court establish the doctrine, that no plaintiff, in an action for negligence, can recover, if he has been guilty of the slightest degree of negligence contributing to the injury complained of. And, then, he would have the further doctrine established, that,

if the plaintff could have avoided the injury, by any possible act or omission on his part, and did not do so, he was guilty of contributory negligence. It might be that he had exercised greater care, in every particular, than any person had ever before done; it might be that he had used greater caution than the most prudent of men would have done under like circumstaces, and, yet, if in the light of subsequent events, it might be seen that he could possible have exercised still greater care or caution, he must not recover. His negligence might be infinitesimal in degree; it might be such that the most careful, cautious, prudent and diligent of men would almost inevitably have fallen into it; and yet, as counsel would say, he must not recover, for he was guilty of some negligence, slight indeed, but some, and degrees of negligence must never be counted, but the slightest possible negligence will bar a recovery. Such is not the law, and never was the law.

AGENCY—CONTRACT IN AGENT'S NAME TO SELL—POSSESSION.

HILL v. CROSBY.

Supreme Court of Ohio.

A broker who was not intrusted with the possession of the property, contracted in his own name to sell the same to a vendee, who had no knowledge that the broker was not the real owner, but dealt with him as such. The broker notified his principals that he had sold for them, and directed where to ship the property to the purchaser. The owners, without any knowledge that the broker had contracted in his own name, and without any conduct on their part, clothing the broker with authority to receive payment for them, or any possession, actual or constructive, of the property, delivered the same to the vendee: *Held*, that payment by the purchaser to the broker, under such circumstances, is not a bar to the right of recovery by the owner.

Motion for leave to file a petition in error to the Superior Court of Cincinnati.

The plaintiff J. S. Crosby and W. W. Collins filed their petition against William H. Hill, alleging that on or about March 12, 1881, they were partners and engaged in the lumber business at Granville, Michigan. That one Roth, a lumber broker in Cincinnati, represented to them that he had, as such broker, sold for them to the defendant one car load of shingles at $3.55 per thousand; that thereupon they shipped to their own order 70,000, to be delivered to Hill by the railroad company, upon payment by Hill of the freight thereon; that about March 31, 1881, Hill, or some one for him, paid the freight and received the shingles, but he has refused and failed to pay plaintiffs for them or to return the shingles, and prays for a judgment for $197.50, the value of the shingles after crediting the freight paid.

The answer denies the conversion of the shingles, the ownership of the plaintiffs and any indebtedness to the plaintiffs, and avers that defendant bought the shingles of Roth and paid him the full value thereof, and that when he made such payment he had no knowledge from whom Roth purchased the same, or that plaintiffs claimed any title or interest therein. The allegation of want of knowledge is denied by the reply.

Upon the trial plaintiff offered evidence, that Roth, in advising them of the sale, directed them to ship the goods to Glendale and send the invoice to Cincinnati; that thereupon they shipped the goods to Glendale to their own order, and mailed to defendant at Cincinnati an invoice and also an order on the railroad agent at Glendale to deliver the goods on payment of the freight. The defendant offered evidence that he dealt with Roth as a principal, not knowing that he was a broker; that he never received the invoice and delivery order; that from the time of making the contract with Roth until after the middle of April, he was a member of the legislature and living at Columbus, attending its sessions; that he there received notice from Roth that the shingles were about to arrive; that he instructed his agent to receive them and pay the freight, which was done; that he paid Roth for the same on April 21, 1881, and that he never heard that plaintiffs claimed any interest in them until May 26, 1881, when they wrote demanding payment.

It was admitted upon the trial that the plaintiffs were in fact the owners of the shingles, notwithstanding the denial of such ownership in the answer. Part of the testimony of the plaintiffs consisted of a deposition of one of them, taken under a notice which omitted to state that such plaintiff would be examined. The court by agreement of counsel submitted to the jury the single question whether the defendant at the time he paid Roth, had notice of plaintiffs' rights or claim, and the jury having reported that they were unable to agree upon that question, the court directed them, that, however that question might be determined, the plaintiffs were entitled to a verdict, and to return such verdict, leaving only the question of the value of the property for their determination. In response to such charge, verdict was returned for the plaintiffs. The charge was excepted to by the defendant, who also excepted to the refusal of the court to give certain instructions asked by him.

A motion for a new trial was made and heard by the court in general term, overruled and judgment entered on the verdict. Leave is now asked to file a petition in error in this court to reverse that judgment.

Cornell & Marsh for plaintiffs in error; *Wilby Wald* for defendants in error.

DOYLE, J., delivered the opinion of the court:

The allegations of the petition that Roth, a lumber broker in Cincinnati, represented to plaintiffs that, as such broker, he had sold for them to the defendant, the car load of shingles, and that such shingles were shipped by them to their own

order, to be delivered to the defendant by the railroad company, upon the payment of the freight, are not denied in the answer. There is no allegation in the answer, nor is there anything in the evidence tending to show that the plaintiffs ever authorized the broker to secure payment for them; ever entrusted the broker with the possession of the property, or by any conduct of theirs, enabled him to appear as owner of the goods and thereby impose upon a third person who was without fault; or that plaintiffs had any knowledge that Roth contracted in his own name and not in theirs, from which any ratification of such contract could be inferred, but the contrary affirmatively appears from allegations of the petition. The case made by the defendant is that he dealt with Roth, believing him to be the owner, and paid him as such without knowledge of the rights of plaintiffs.

The answer contained a denial of the ownership of plaintiffs, but that was withdrawn upon the trial and the title of plaintiffs admitted. Without such denial, the question now presented might well have been raised by demurrer to the answer. In view of the peremptory charge of the court, all the proof offered by the defendant, pertinent to the issue, must be taken as true, and as that proof tends to sustain the allegations of the answer (with the denial of ownership omitted), the question is substantially the same as would be presented by such demurrer.

The case presented therefore is this: a broker who is not entrusted with the possession of property, contracts in his own name to sell the same to a vendee, who has no knowledge that he is not the real owner, but deals with him as such. The broker notifies his principals that he has sold for them, and directs where to ship the property to the vendee. The owners, without any knowledge that the broker has contracted in his own name, and without any conduct on their part clothing the agent with authority, express or implied, to receive payment for them, or any possession actual or constructive of the property, delivers the same to the vendee. Will payment by the vendee to the broker under such circumstances, without knowledge of the rights of the owner, prevent the owners from recovering?

In Baring v. Corrie, 2 B. & Ald. 137, this question is distinctly answered in the negative: "the broker has not the possession of the goods, and so the vendee can not be deceived by that circumstance; and besides the employing of a person to sell goods as a broker, does not authorize him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority and his principal is not bound. But, it is said that by these means the broker would be enabled by his principal, to deceive innocent persons. The answer, however, is obvious, that he can not do so, unless the principal delivers over to him the possession and indicia of property." Id. 148.

In Drakeford v. Piercy, 7 Best & Smith, 515, there was a declaration for goods sold and delivered; plea that the plaintiffs sold and delivered the goods by one Davies, his agent in that behalf, that defendant purchased of Davies, not as agent, but as vendor on his own account, that Davies sold as actual vendor, that defendant had no notice or knowledge to the contrary, until after payment, that he paid the whole price to Davies, *bona fide*, believing that he was vendor on his own account and entitled to receive payment. A demurrer to the plea was sustained. After citing Baring v. Corrie, Blackburn, J., says: "The defense of judgment here must rest on the plaintiffs having, by improper conduct, enabled Davies to appear as proprietor of the goods or clothed him with real or apparent authority to receive payment. But the plea carefully avoids any statement to that effect." To the same effect is Semenza v. Brinsley, 114 E. C. L. R. (18 C. B. N. S.) 467.

On the other hand in Borries v. The Imperial Ottoman Bank, 9 Law Rep. (C. P.) 38, to a similar declaration, the plea was "the goods were sold and delivered to the defendants by S & Co., then being the agents of the plaintiff, and entrusted by the plaintiff, with the possession of the goods as apparent owners thereof, that S & Co. sold in their own name as their goods, and that defendants had no knowledge that plaintiffs were the owners of the goods, etc. The plea was held to be good because of the statement, absent from the pleas in the former cases, that the agents were entrusted with the possession as apparent owners. The American authorities sustain the rule thus established by the English courts. Wharton on Agents & Agency, secs. 712-714: Story on Agency, secs. 23. 33, 109; Benjamin on Sales (3d Am. ed.), 742; Seeple v. Irwin, 30 Pa. St. 514; Higgins v. Moore, 34 N. Y. 417; Saladin v. Mitchell, 45 Ill. 83; Brown v. Morris, 83 N. C. 254; Clark v. Smith, 88 Ill. 298; Korneman v. Monaghun, 24 Mich. 36; McKindly v. Dunham, 55 Wis. 515. And see Rowland v. Gundy, 5 Ohio, 202.

To the rule thus established there are certain exceptions resting upon the usage of certain lines of business. Wharton on Agency, sec. 713; Story on Agency, sec. 109; Benj. on Sales, sec. 742, but such usages are matters to be pleaded and proved, and wholly absent from the case at bar.

The distinction between this case, and one where an agent is acting within the scope of his authority, or a bailee, factor or commission merchant entrusted with the possession of the property and the power to sell, and thus enabled to deal with it as his own, is very apparent. In the latter cases, like Thorn v. Burk, 37 Ohio St. 254, where the agent sells the property, receives payment and appropriates it to his own use, the loss must fall upon the principal who confides in the agent and places the power in his hands to deceive purchasers.

The question submitted to the jury whether defendant had knowledge of plaintiff's claim, was

not controlling. Its determination in favor of the defendant would not have defeated plaintiff's recovery. It was, therefore, an immaterial issue, and the peremptory charge was right. There were no facts in the case that tended to show a ratification of the unauthorized contract of the agent, for the reason that such unauthorized contract was not known to the plaintiffs. Bennecke v. Ins. Co., 105 U. S. 360.

Defendant had the means of knowledge at his command, and the fact that Roth had not the possession of the property he was selling, was sufficient to require of defendant that, before payment, he should ascertain to whom payment was due.

There was no error in admitting the deposition. When a witness is competent, and the testimony relevant, and no exceptions are taken to it before the commencement of the trial, the objection is waived. Rev. Stats. sec. 5285. Besides, in the view we take of the case, there could be no injury to the defendant thereby.

Motion overruled.

SALE—GOOD WILL OF BUSINESS—INSURANCE AGENCY.

BARBER v. CONNECTICUT MUTUAL LIFE INS. CO.

United States Circuit Court, Northern District New York, 1883.

1. The good-will of an established business, is a common subject of contract, although it is nothing but the chance of being able to keep the business which has been established, yet the rights of a purchaser of such good-will will be enforced in equity and recognized at law as effectual between the parties to the contract.

2. Where the general agents of an insurance company, by their representations, induced complainant to invest money in the purchase of the good-will of a special insurance agency; if without right he was deprived of an opportunity of transferring his interest to another, he is entitled to compensation to the extent of his loss.

3. The general agents of a foreign insurance company in a State other than the State of its creation, having authority to solicit applications for insurance and collect the premiums therefor, and authorized to appoint local agents and pay them reasonable commissions, and obligated to bear all the expenses of the business within their territory, can not bind the company by their conduct or representations respecting the purchase of the good-will of a local agency.

4. A contract which would create the relation of vendor and purchaser between an insurance company and a third party, and as such outside the ordinary and customary contracts, which are within the implied authority of the general agents of the company, is not binding on the company.

Sedgwick, Ames & King, for complainant; *Pratt, Brown & Garfield*, for defendant.

WALLACE, J., delivered the opinion of the court:

The proofs establish, in substance, the theory of the bill that the complainant purchased the good-will of Marvin and of Carr, in their business as local agents for the defendant, upon the faith of the assurances of Peck & Hillman, the general agents of the defendant in this State. These representations were to the effect that it had been their uniform practice, while having charge of the local agencies within their territory, to permit their subagents, when desiring to relinquish their agencies, to sell the good-will of the agency business to some acceptable successor, and that the right of the local agents to make such transfers was always recognized and protected by the general agents, and that complainant might rely upon this privilege when he wanted to relinquish his agency. The value of this right is apparent, in view of the peculiar character of the interest of the local agents in the business of their agencies. They were not appointed for any definite period of time, they received no salary, and their only compensation was by commissions upon premiums collected by them while they continued to act as such local agents. They were expected to solicit insurance upon lives for a commission upon the original premiums, and the renewal premiums which might be paid during the continuance of their employment. In view of this uncertain tenure, and, doubtless, in order to stimulate them to make their agencies valuable, the custom of permitting them to dispose of the good-will of their agencies had been sanctioned by the general agents. Purchasers could be found who would be willing to pay a large consideration for the interest in an established agency business, which was producing a revenue from the commissions to accrue upon the renewal premiums paid in from year to year by those who had insured with the agency. The agents' privilege of finding such a purchaser, and the assurance that the general agents would co-operate in making this a practical and valuable possibility, was a substantial incident of the relation between the subagent and the general agent.

Notwithstanding the precarious value of such a right, there seems to be no good reason why it should not be recognized and protected by the law. The good-will of an established business which is a common subject of contract, is nothing but the chance of being able to keep the business which has been established. The sale of a mere chance, which vests in the purchaser nothing but the possibility that a preference which has been usually extended to those whose rights he acquires will be extended to him, has been enforced in equity, and recognized at law as effectual between the parties to the contract. Phyfe v. Wardell, 5 Paige, 268; Armour v. Alexander, 10 Paige, 571; Hathaway v. Bennet, 10 N. Y. 108.

The complainant having been induced by the representations of Peck & Hillman to invest several thousand dollars in the purchase of this prop-

erty interest, acquired as against them what he purchase, and if without right he was deprived of an opportunity of transfering his interest to another, he is entitled to compensation to the extent of his loss.

It has been objected, however, that the complainant's remedy is at law, and as there is no relief to which he is entitled, except a recovery of damages, the objection seems unanswerable. He can not find his right to resort to equity upon the ground of fraud or trust. His case must rest upon the plain theory of the violation of a contract. There are allegations in the bill that he was deprived of vouchers relating to his agency business, by the false representation of the general agents. These vouchers were the property of the defendant. The complainant does not assert that he had any lien upon them.

There are no difficulties in the way of establishing his damages at law, which would not be encountered in equity. Doubtless it would be difficult in either jurisdiction to determine the just measure of his compensation, but his recovery would depend upon the same rule of damages in both.

There is another ground upon which the complainant must fail, and that is because he has selected the wrong party as defendant. Peck & Hillman had no authority to bind the defendant by their conduct or representations respecting the purchase by the complainant of the good-will of his predecessors. They were the agents of the defendant for this State, to solicit applications for insurance, and collect the premium paid by persons insuring in their territory. They were authorized to appoint subagents and pay them reasonable commissions, and were obligated to bear all the expenses of soliciting insurance and collecting premiums within their territory, including the commissions and expenses of the subagents. Although they were termed general agents, the complainant had no right to assume that they possessed unlimited authority, and could bind their principal in a transaction so far outside the scope of the usual powers of agents of their description. The state agents of insurance companies ordinarily exercise limited powers, although they represent their principal throughout an extensive territory. It is stated in May on Ins. sec. 125, that their powers differ from those of local agents principally in their geographical extent, except that they may, generally, appoint local or subagents, which local agents can not. They have a wider field of action than local agents, and are expected to exercise a supervisory authority over them.

It may for present purposes be assumed that the defendant would be responsible for the contracts made by Peck & Hillman respecting the compensation to be paid to the sub-agents they were authorized to appoint, but it would not be responsible for a contract made by them giving an extraordinary compensation to a sub-agent. The limitation upon the implied powers of such agents to charge their principals is well illustrated by the case of Anchor Life Ins. Co. v. Pease, 44 How. 385, where it was held that the general agents of a life insurance company had no implied authority to make an agreement with a physician employed by them in examining applicants for insurance, whereby the company were obligated to accept his services in payment of the premium on a policy issued to him by the company. The contract to which it is sought to hold the defendants is one which would create the relation of vendor and purchaser between the company and the complainant, and, as such, is quite outside the ordinary and customary contracts which are within the implied authority of such agents to make.

Furthermore, the proofs show that Peck & Hillman did not assume to speak for the insurance company in the negotiations respecting the purchase by complainant. The representations made by Hillman were concerning the course which Peck & Hillman had adopted in the past, and would adhere to in the future, respecting the transfer by their sub-agents of the good-will of their agencies, and related solely to their personal conduct and intentions. The case is destitute of evidence to show that complainant ever had any reason to suppose that he was dealing with the defendant in the purchase of the agency business.

The theory that the complainant was justifiably removed as local agent, for dereliction of duty, has not been considered, because it has not been deemed necessary to the decision of the controversy. Whether there was any misconduct on the part of the complainant, and, if so, whether the right to terminate his agency would relieve Peck & Hillman of liability for refusing to permit him to transfer the good-will of his agency business, are questions which ought not to be determined unnecessarily.

The bill is dismissed.

WEEKLY DIGEST OF RECENT CASES.

1. EVIDENCE—CROSS-EXAMINATION.
The rule that the cross-examination must be confined to questions propounded and answered on the examination-in-chief not followed in Texas. *Rhine v. Blake*, S. C. Tex., April 17, 1883; 1 Tex. L. Rev. 241.

2. FRAUDULENT CONVEYANCE—PROPERTY PURCHASED IN NAME OF WIFE.
A conveyance to a third party, who gave no consideration therefor, but took the title in trust for the wife of the grantor, and a conveyance from such

third party to the wife of such vendor, is no evidence of fraud. Where a wife had made advances to her husband from time to time by way of loan and not of gift, the subsequent conveyance of land through a third person to her in re-payment of such loans, and not made with the purpose of hindering, delaying or defrauding creditors, but to satisfy his equitable obligation to his wife, is not a voluntary conveyance, and is valid against his creditors. *Metsker v. Bonebrake*, U. S. S. C., March 5, 1883; 2 Sup. Ct. Rep. 351.

3. JURY TRIAL—IRREGULAR VERDICT.

In an action for work and labor, etc., upon a sawmill, the defense was that the plaintiff had not fulfilled his contract in certain specified particulars; the jury found "in favor of the plaintiff for $246, and that the plaintiff complete the job according to contract." Subsequently, after consideration of affidavits asserting that the work had been so done since verdict rendered, and of counter affidavits denying the fact, the court upon motion ordered judgment to be entered on the verdict: *Held*, to be error, because the verdict was irregular, in that it was not responsive to the issue, and because such action by the court could not deprive the defendants of the right of trial by jury as to the matter of fact involved in the condition attached to the verdict. *Bruck v. Maulsberry*, S. C. Pa.; 14 Lanc. Bar, 194.

4. JURY TRIAL—PRACTICE—RECALLING THE JURY FOR FURTHER INSTRUCTIONS.

After the court has concluded charging the jury, and they have retired, it is entirely proper for the court to recall them to give them any instruction which was inadvertently omitted. *Cox v. Highley*, S. C. Pa.; 14 Lanc. Bar, 193.

5. NATIONAL BANK—OATH OF OFFICERS—NOTARIES PUBLIC.

Prior to the passage of the act of February 26, 1881 (21 St. 352), notaries public in the several States had no authority to administer to officers of national banking associations the oath required by sec. 5211 of the Revised Statutes of the United States. An indictment against an officer of a national bank under section 5392 for a wilfully false declaration or statement in a report made under section 5211, verified by his oath administered by a notary public of a State prior to the act of February 26, 1881, can not be sustained. By section 5392 it was meant that the oath must be permitted or required by at least the laws of the United States, and be administered by some tribunal, officer, or person authorized by such laws to administer oaths in respect of the particular matters to which it relates. *United States v. Curtis*, U. S. S. C., April 9, 1883; 2 S. C. Rep., 507.

6. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DILIGENCE—CUMULATIVE EVIDENCE.

Action by appellant for seduction under promise of marriage. The question is whether appellant was entitled to a new trial on the ground of newly-discovered evidence. The affidavit alleged that during the time she lived at the defendant's house, a boy named Kertman, aged fifteen, also lived there; that before the trial he was asked if he knew anything about the case, and answered that he did not; that since the trial he had disclosed that he overheard certain conversations between the plaintiff and defendant in which they spoke of getting married, and in one of which the defendant said. "We must not do what we have done any more. If anything happens wrong to you we will get married and go out to Iowa this summer." *Held*, No want of diligence appeared in not having the testimony of Kirtman at the former trial. Nor was this evidence merely cumulative. If this evidence had been introduced at the trial, it would have tended to prove the same substantial facts as those to which the testimony of all the other witnesses of the plaintiff was directed, but in a materially different way. There was no other testimony as to such conversations, except that of the plaintiff herself, and these the defendant wholly denied. He denied also that he had ever spoken to the girl about marriage. It would have been the introduction of other circumstances tending to establish the facts in issue, and this is not cumulative evidence. *Koehler v. Bartlett*, S. C. Ind., May 8, 1883.

7. PRACTICE—EQUITY—MASTER'S REPORT.

Where the evidence taken by the master in bankruptcy proceedings was reported with his findings, and the case was treated by the court below without much regard to the finding of the facts by the master, or any special regard to the exceptions made to his report, it is incorrect practice in chancery cases in the circuit courts of the United States. *Metsker v. Bonebrake*, U. S. S. C., March 5, 1883; 2 Sup. Ct. Rep., 351.

8. REVENUE LAW—CUSTOM DUTIES—GLASS BOTTLES OR JARS—MINERAL WATER.

Under Schedule B of section 2504 of the Revised Statutes, which imposes a duty of 30 per cent. *ad valorem* "on glass bottles or jars filled with articles not otherwise provided for," such duty is chargeable on bottles filled with natural mineral water, although, by section 2505, mineral water, not artificial, is declared to be exempt from duty. *Merritt v. Stephani*, U. S. S. C., March 19, 1883; 2 S. C. Rep., 308.

9. REVENUE LAWS—CUSTOM DUTIES—GLASS BOTTLES—BEER.

The decision of this court in Schmidt v. Badger, at this term (1 Supreme Ct. Rep. 530), that, under the statutory provisions in question in this case, the proper duty on the importation of glass bottles containing beer was a duty of 30 per cent. *ad valorem* on the bottles, in addition to a specific duty of 35 cents a gallon on the beer, confirmed, and applied to this case. *Merritt v. Park*, U. S. S. C., March 19, 1883; 2 S. C. Rep., 310.

10. SALE—DELIVERY OF PERSONAL PROPERTY—POSSESSION OF CARRIER—USAGE OF TRADE.

A sold to B fifty barrels of flour out of a lot of one hundred barrels, all of the same brand and quality, stored by itself at a railroad depot. The carrier's charges had been paid, and the flour was in charge of the agent of the railroad company, as a warehouseman. Subsequently he sold to C and D twenty-five barrels each. He gave to each purchaser, in the order of sales, an order on the company's agent for the number of barrels purchased. B sent his team and driver, with his order, to bring away a part of his purchase. The driver presented the order to the agent, who received the same, and pointed out the lot of flour, from which the driver took seventeen barrels, leaving the order and his receipt for the flour removed. After this on the same day, C and D each presented his order receipted for and took away the flour they had purchased, leaving the thirty-three barrels due on B's order in store, which was destroyed by fire the ensuing night. It was the usage of the business with reference to which the parties contracted, that flour so received by rail

and stored, was not removed by consignee to his possession, but remained in the custody of the railroad company until sold, and that the owner sold in lots to such purchasers and gave to each purchaser an order on the company for the amount purchased, and upon presentation of such an order the agent would point out the lot from which the order was to be filled, and the purchaser would remove and receipt for the amount taken. Nothing remained to be done by the seller in contemplation of the parties to complete the sale. *Held*, that by such usage the flour called for by the order after its acceptance by the railroad company was the property of the purchaser, and he was liable to the seller for the price, though part of it was destroyed before being removed to his actual possession. *Newhall v. Langdon*, S. C. Ohio, April 17, 1883; 3 Ohio L. J., 570

1 SPECIFIC PERFORMANCE—PROOF OF THE CONTRACT—CERTAINTY.

When there is an application for specific performance, the proof of the intention of the contracting parties must be clear, and the contract certain in its terms, and free from all shade or color of ambiguity. That all agreements to be executed in equity must be certain and defined equal and fair, and proved as the law requires, and that it was enough to doubt on any one of these points to refuse relief. *Wilks v. Burns*, Md. Ct. App., 10 Md. L. Rec. April 14, 1883.

12. TRUST — CHARITABLE USE — INSTITUTION FOR EDUCATION OF YOUTH.

William Russell, of St. Louis, "for the purposes of founding an institution for the education of youth in St. Louis county, Missouri," granted lands and personal property in Arkansas to John S. Horner and his successors, in trust "for the use and benefit of the Russell institute of St. Louis, Missouri." with directions to the grantee to sell them, and to account for and pay over the proceeds "to Thomas Allen, president of the board of trustees of said Russell Institute at St. Louis, Missouri," whose receipt should be a full discharge to the grantee. *Held*, that this was a charitable gift, valid against the donor's heirs and next to kin, although the institution was neither established nor incorporated in the lifetime of the donor or of Allen. *Russell v. Allen*, U. S. S. C., March 5, 1883; 2 S. C. Rep. 327.

13. TRUSTS—DEVISE TO CHARITABLE USES—PERPETUITIES.

In a will containing many legacies, bequests, and devises, each present and immediate in form, to individuals and to charitable institutions, a clause expressing a wish and direction that none of the legacies, bequests, or devises "shall be executed or take effect until" a certain memorial hall (in fact nearly finished at the time of the execution of the will and of the testator's death) on land previously conveyed by the testator in trust, "shall be completed and entirely paid for out of my estate," does not suspend the vesting, but only the payment and carrying out of the various legacies, bequests, and devises. Section 2419 of the Code of Georgia of 1873, does not invalidate a charitable devise contained in a will, executed within 90 days before the testator's death, unless he leaves a wife or child or descendants of a child. The validity of a charitable devise, as against the heir at law, depends upon the law of the State where the land lies. The validity of a charitabe bequest, as against the next of kin, depends upon the law of the State of the testator's domicile. The law of charities is fully adopted in Georgia, as far as is is compatible with a free government where no royal prerogative is exercised. A parcel of land, with buildings thereon, was devised to the trustees of the Independent Presbyterian Church in Savannah, an incorporated religious society. "upon the following terms and conditions, and not otherwise:" (1) That the trustees should appropriate annually out of the rents and profits the sum of $1,000 "to one or more Presbyterian or Congregational churches in the State of Georgia, in such destitute and needy localities as the proper officers of said Independent Presbyterian Church may select, so as to promote the cause of religion among the poor and feeble churches of the State;" (2) that the trustees should not materially alter the pulpit or galleries of the present church edifice, or sell the lot on which the Sabbath-school room of the church stood; (3) that the trustees should keep in order the burial-place of the testator, which he devised to them for that purpose. *Held*, that under the Code of Georgia of 1873, sec. 3157, the charitable purposes named in the first and third conditions were good charitable uses, sufficiently defined; that the trustees were capable of taking the devise; and that its validity was not impaired by the conditions subsequent. A devise to a society incorporated "for the relief of distressed widows, and the schooling and maintaining of poor children," of buildings and land, to "use and appropriate the rents and profits for the support of the school and charities of said institution, without said lot being at any time liable for the debts or contracts of said society," is a good charitable devise. A devise to a society incorporated "for the relief of indigent widows and orphans in the City of Savannah," of buildings and lands, "the rents and profits to be appropriated to the benevolent purposes of said society," is a good charitable devise. The rule against perpetuities does not apply to charities, and if a devise is made to one charity in the first instance, and then over, upon a contingency which may not take place within the limit of that rule, to another charity, the limitation over to the second charity is good. Restrictions imposed by the charter of a corporation upon the amount of property that it may hold, can not be taken advantage of collaterally by private persons, but only in a direct proceeding by the State. The provision of the Constitution of Georgia of 1868, which declares that "the General Assembly shall have no power to grant corporate powers and privileges to private companies [with certain exceptions], but it shall prescribe by law the manner in which such powers shall be exercised by the courts," does not take away from the General Assembly the power to amend the charters of existing corporations by modifying or enlarging their powers. A devise to a historical society of a house containing a collection of books, documents and works of art, in trust to keep and preserve the same, with the collection therein, and other books and works of art to be purchased by the officers of the society out of the income of a fund bequeathed by the devisor for the purpose, "as a public edifice for a library and academy of arts and sciences," and "to be open for the use of the public" on such terms and under such reasonable regulations as the society may prescribe, is a good charitable devise, and is not invalidated by a requirement to place and keep over the entrance a marble slab with the name of the testator en-

graved thereon; and if the society is incapable of executing the trust, a court of equity, in the exercise of its ordinary jurisdiction, and under sec. 3195 of the Code of Georgia of 1873, may appoint a new trustee. A devise and bequest in trust for the building, endowment and maintenance of "a hospital for females within the City of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for in such manner and on such terms as may be defined and prescribed by" certain directresses named and their associates, who are to obtain an act of incorporation for the purpose, is a valid charitable devise and bequest, although no time is limited for the erection of the building or the obtaining of the charter. A bequest to "the First Christian Church, erected, or to be erected, in the village of Telfairville, in Burk County, or to such persons as may become trustees of the same," is a good charitable bequest. *Jones v. Habersham*, U. S. S. C., March 5, 1883; 2 Sup. Ct. Rep. 336.

14. USURY—INTEREST PAYABLE IN GOLD.

The interest on a note which, by its very words, is payable in gold, is payable in gold or its equivalent in legal tender notes. Such payment is not usurious. *Isett v. Caldwell*, S. C. Pa., Oct. 2, 1882; 14 Lanc. Bar, 186.

RECENT LEGAL LITERATURE.

SEVENTH SAWYER. Reports of Cases decided in the Circuit and District Courts of the United States for the Ninth Circuit. Reported by L. S. B. Sawyer. Vol. 7. San Francisco, 1882: A. L. Bancroft & Co.

The most important cases included in this volume are probably those which involve questions of constitutional and international law, growing out of the presence of the Chinese population on the Pacific Slope. Among the more notable of these is the famous "Laundry Ordinance Case." The ordinance in question was an enactment of the board of Supervisors of San Francisco City and County, intended for the purpose of excluding the hated Celestial "washee-washee" from the portions of the city most affected by the better class of American inhabitants, by making the petition of a certain number of residents in the block a requisite for the granting of a license for the establishment of a laundry. In the course of the opinion, Mr. Justice Field found it necessary to remark that, "The business of a laundry—that is, the washing of clothing and cloths of various kinds, and ironing or pressing them to a condition to be used—is not of itself against good morals, or contrary to public order or decency."

BLATCHFORD'S CIRCUIT COURT REPORTS. Reports of Cases argued and determined in the Circuit Court of the United States of the Second Circuit. By Samuel Blatchford, an associate Justice of the Supreme Court of the United States. Vol. XIX. New York, 1883: Baker, Voorhis & Co.

This volume of this well known and admirably reported series, covers the period between April, 1880 and September 1881, and is particularly rich in equity and patent cases.

POMEROY'S MUNICIPAL LAW. An Introduction to Municipal Law, Designed for General Readers, and for Students in Colleges and Higher Schools. By John Norton Pomeroy. Second Edition. San Francisco, 1883: A. L. Bancroft & Co.

There probably never was a period more prolific of law books than the present, and yet it is a striking fact that in all the flood of books that annually issues from the press, a really meritorious work of an elementary character is so rare as be to almost non-existent. This fact is due, perhaps, to a lack of realization on the part of legal authors of the differences in the needs of legal practitioners and of law students. The one seeks results and the other an elucidation of the principles by which the results are produced. The distinction has been fully grasped by Mr. Pomeroy, and the result is a work on elementary law beyond all compare the most valuable and practically available for the use of the general student that we have seen.

It is delightfully written, and no lawyer who appreciates the opportunity of systematizing and arranging knowledge previously acquired, which is given in the perusal of an elementary work of this character, will regret the time devoted to it.

AMERICAN PROBATE REPORTS.—Containing Recent Cases of General Value, Decided in the Courts of the Several States on Points of Probate Law, with Notes and References. By Wm. W. Ladd, Jr. Vol. II. New York, 1883: Baker, Voorhis & Co.

We have heretofore expressed our approval of the plan and purpose of this series, (13 C. L. J. 500) and can find nothing in this second volume to make us wish to retract that approbation. It is fully up to the standard of its predecessor in every respect, and in point of the elaboration of the notes, is propably somewhat superior to it. The usefulness of a series of selected probate cases planned and conducted as this is, to the very large and respectable class in the profession, who make a specialty of such practice, is too plain to require argument; and of course each added volume increases that value. The typography, press work and binding are excellent.